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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

RICHARD PERRY LOVING, *et ux.*,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF OF N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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Interest of the *Amicus Curiae*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is a non-profit membership corporation, incorporated under the laws of the State of New York in 1940. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race or color who are unable, on account of poverty, to employ and engage legal aid on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is independent of other organizations and is supported by contributions of funds from the public.

The Fund has litigated a great many cases involving the civil rights of Negroes which have sought to eliminate racial segregation and discrimination.[1] One of those cases was *McLaughlin* v. *Florida*, 379 U.S. 184, a case which, as we shall submit below, has an important bearing on the present litigation. The Fund consistent with its opposition to all forms of racial discrimination supports appellants' arguments that Virginia's laws punishing interracial marriage violate the Constitution. The parties have consented to the filing of an *amicus curiae* brief by the N.A.A.C.P. Legal Defense and Educational Fund, Inc. and copies of their letters of consent will be submitted to the Clerk with this brief.

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[1] Some of the cases in which the N.A.A.C.P. Legal Defense and Educational Fund, Inc. has opposed racial discrimination in recent years are cases involving schools (*Brown* v. *Board of Education*, 347 U.S. 483; *Cooper* v. *Aaron*, 358 U.S. 1; *Goss* v. *Board of Education*, 373 U.S. 683; *Bradley* v. *School Board*, 382 U.S. 103; *Rogers* v. *Paul*, 382 U.S. 198); public parks (*Mayor and City Council of Baltimore* v. *Dawson*, 350 U.S. 877; *Holmes* v. *Atlanta*, 350 U.S. 879; *Wright* v. *Georgia*, 373 U.S. 284; *Watson* v. *Memphis*, 373 U.S. 526; *Evans* v. *Newton*, 382 U.S. 296); voting (*Anderson* v. *Martin*, 375 U.S. 399); transportation facilities (*Gayle* v. *Browder*, 352 U.S. 903; *Boynton* v. *Virginia*, 364 U.S. 454; *Bailey* v. *Patterson*, 369 U.S. 41; *Turner* v. *Memphis*, 369 U.S. 350; *Abernathy* v. *Alabama*, 380 U.S. 447); restaurants (*Garner* v. *Louisiana*, 368 U.S. 157; *Peterson* v. *City of Greenville*, 373 U.S. 244; *Gober* v. *City of Birmingham*, 373 U.S. 374; *Bell* v. *Maryland*, 378 U.S. 226; *Bouie* v. *City of Columbia*, 378 U.S. 347; *Barr* v. *City of Columbia*, 378 U.S. 146; *Hamm* v. *Rock Hill*, 379 U.S. 306; *Georgia* v. *Rachel*, 384 U.S. 780); the right of peaceable assembly (*Edwards* v. *South Carolina*, 372 U.S. 229; *Fields* v. *South Carolina*, 375 U.S. 44; *Henry* v. *Rock Hill*, 376 U.S. 776); jury discrimination (*Coleman* v. *Alabama*, 377 U.S. 129); discriminatory treatment of a witness (*Hamilton* v. *Alabama*, 376 U.S. 650), and athletic contests (*State Athletic Commission* v. *Dorsey*, 359 U.S. 533).

Argument

Appellants were convicted of violating Virginia Code Section 20-58, and Virginia's highest court has rejected their objections that the statute violates their rights under the Constitution of the United States. Section 20-58 is one of several Virginia laws which prohibit marriages between white persons and colored persons.[2] It provides:

> §20-58. Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in §20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

The Supreme Court of Appeals of Virginia, in the opinion below, found "no sound judicial reason" (R. 25), to depart from its prior decision upholding the law forbidding interracial marriage against a federal constitutional challenge. *Naim* v. *Naim,* 197 Va. 80, 87 S.E.2d 749 (1955), *judg. vacated,* 350 U.S. 891 (1955), *judg. reinstated,* 197 Va. 734, 90 S.E.2d 849 (1956), *motion to recall mandate denied,* 350 U.S. 985 (1956) (case "devoid of a properly presented federal question"). In *Naim* v. *Naim, supra,* the Virginia court said that the purpose of the state's laws against

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[2] Va. Code §20-54 prohibits interracial marriage in the State. Section 20-57 provides that marriages between white and colored persons are "absolutely void without any decree of divorce or other legal process." Section 20-59 makes inter-marriage a felony punishable by confinement in the penitentiary for not less than one nor more than five years. Section 20-60 provides that any person performing a marriage ceremony between a white person and a colored person shall forfeit two hundred dollars.

intermarriage was "to preserve the racial integrity of its citizens" and so that the state "shall not have a mongrel breed of citizens" (87 S.E.2d at 756), and that: "If preservation of racial integrity is legal, then racial classification to effect that end is not presumed to be arbitrary" (87 S.E.2d at 755). Appellants argued in the courts below that *Naim* v. *Naim, supra,* should not be followed because it was based upon precedents—particularly *Plessy* v. *Ferguson,* 163 U.S. 537, and *Pace* v. *Alabama,* 106 U.S. 583—which had been overruled. The court below rejected these arguments, and asserted that *McLaughlin* v. *Florida,* 379 U.S. 184, which appellants relied on, "detracted not one bit from the position asserted in the *Naim* opinion" (R. 24). The court thought that none of the many decisions invalidating racial laws under the Fourteenth Amendment[3] required invalidation of the law punishing interracial marriage because of "an overriding state interest in the institution of marriage" (R. 24). We submit that the laws forbidding and punishing marriages between white persons and Negroes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

Virginia Code §20-58, on its face and as applied in this case, makes a person's race the test of whether his conduct is criminal. No penalty is provided for persons of the same race who engage in the conduct mentioned in the section—i.e., leaving the state for the purpose of being married, with the intention of returning, being married out of the state, and afterwards returning to and residing in the state cohabiting as man and wife. The essence of the law is racial, and race is the test of criminality. It is obvious, and doubtless would be conceded by the State,

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[3] See, e.g., cases collected in note 1, *supra,* and see text *infra,* p. 6.

that appellants' conduct would be entirely lawful under Virginia law had they both been white, or both Negroes.

We urge that the issue of the invalidity of this law may be disposed of on this ground and without reference to other possible formulations of the issue. As Mr. Justice Stewart, joined by Mr. Justice Douglas, wrote concurring in *McLaughlin* v. *Florida,* 379 U.S. 185, 198:

> . . . I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. * * * And I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se.*

In *McLaughlin, supra,* the opinion of the Court, by Mr. Justice White, invalidated Florida's interracial cohabitation law "without reaching the question of the validity of the State's prohibition against interracial marriage" (379 U.S. at 195). The opinion of the Court in *McLaughlin, supra,* said that the Florida law was invalid "Because the section applies only to a white person and a Negro who commit the specified acts and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes . . ." (379 U.S. at 184). The opinion said also that this racial classification "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." 379 U.S. at 192. The Court then inquired whether there was any statutory purpose which might justify the classification; found that there was none; and held the law invalid under the Equal Protection Clause.

We urge that racially discriminatory state laws are no longer only "constitutionally suspect" (*Bolling* v. *Sharpe*, 347 U.S. 497, 499) and merely subject to "rigid scrutiny" (*Korematsu* v. *United States*, 323 U.S. 214, 216). The decisions which have invalidated every state segregation law or practice to come before this Court establish that there can be no justification for such laws and that they are all invalid *per se*. *Strauder* v. *West Virginia*, 100 U.S. 303; *Buchanan* v. *Warley*, 245 U.S. 60; *Harmon* v. *Tyler*, 273 U.S. 668; *Smith* v. *Allwright*, 321 U.S. 649; *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 203; *Shelley* v. *Kraemer*, 334 U.S. 1; *Barrows* v. *Jackson*, 346 U.S. 249; *Brown* v. *Board of Education*, 347 U.S. 483; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U.S. 877; *Holmes* v. *Atlanta*, 350 U.S. 879; *Gayle* v. *Browder*, 352 U.S. 903; *Cooper* v. *Aaron*, 358 U.S. 1; *New Orleans City Park Improv. Asso.* v. *Detiege*, 358 U.S. 54; *Evers* v. *Dwyer*, 358 U.S. 202; *State Athletic Commission* v. *Dorsey*, 359 U.S. 533; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Bailey* v. *Patterson*, 369 U.S. 41; *Turner* v. *Memphis*, 369 U.S. 350; *Johnson* v. *Virginia*, 373 U.S. 61; *Peterson* v. *City of Greenville*, 373 U.S. 244; *Lombard* v. *Louisiana*, 373 U.S. 267; *Wright* v. *Georgia*, 373 U.S. 284; *Watson* v. *Memphis*, 373 U.S. 526; *Goss* v. *Board of Education*, 373 U.S. 683; *Anderson* v. *Martin*, 375 U.S. 399; *Bradley* v. *School Board*, 382 U.S. 103; *Evans* v. *Newton*, 382 U.S. 296. We think the teaching of these cases, viewed against their varied circumstances and against the multitude of supposed justifications for segregation which have been offered and rejected, is simply that the Equal Procetion Clause strikes down all forms of racial segregation laws. It is beyond the power of the state to compel segregation whatever the context and whatever the asserted justification. As Mr. Justice Stewart

wrote in 1963, " . . . our Constitution presupposes that men are created equal, and that therefore racial differences cannot provide a valid basis for governmental action." *Abington School District* v. *Schempp*, 374 U.S. 203, 317 (dissenting opinion).

Most especially in the area of criminal justice must the law be administered "without reference to consideration based on race." Cf. *Gibson* v. *Mississippi*, 162 U.S. 565, 591. To send a person to prison because of the color of his skin would make a mockery of the constitutional promise of equal protection of the laws. The Fourteenth Amendment overrides any State choice to inflict penal sanctions based on race or color. Such a choice is simply denied to the States. The "pervading purpose" of the Thirteenth, Fourteenth and Fifteenth Amendments was to protect Negroes against discrimination. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 71. The Fourteenth Amendment was adopted to declare " . . . that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Strauder* v. *West Virginia*, 100 U.S. 303, 307.

Professor Charles L. Black, Jr. has cogently stated that the application of the Equal Protection Clause to cases of racial discrimination calls for no inquiry about whether such discriminations are "reasonable." Professor Black wrote:

> But the whole tragic background of the fourteenth amendment forbids the feedback infection of its central purpose with the necessary qualifications that have attached themselves to its broader and so largely acci-

dental radiations. It may have been intended that "equal protection" go forth into wider fields than the racial. But history puts it entirely out of doubt that the chief and all-dominating purpose was to ensure equal protection for the Negro. And this intent can hardly be given the self-defeating qualification that necessity has written on equal protection as applied to carbonic gas. If it is, then "equal protection" for the Negro means "equality until a tenable reason for inequality is proferred." On this view, Negroes may hold property, sign wills, marry, testify in court, walk the streets, go to (even segregated) school, ride public transportation, and so on, only in the event that no reason, not clearly untenable, can be assigned by a state legislature for their not being permitted to do these things. That cannot have been what all the noise was about in 1866.

What the fourteenth amendment, in its historical setting, must be read to say is that the Negro is to enjoy equal protection of the laws, and that the fact of his being a Negro is not to be taken to be a good enough reason for denying him this equality, however, "reasonable" that might seem to some people. All possible arguments, however convincing, for discriminating against the Negro, were finally rejected by the fourteenth amendment.[4]

However, if it is thought to be necessary to inquire whether Virginia's law serves any legitimate interest of the State which can justify the racial classification, any lingering doubt about the invalidity of the law ought to be readily dispelled.

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[4] Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 423 (1960).

The court below asserts "an overriding state interest in the institution of marriage" (R. 24). Surely the States have traditionally exercised considerable control over the institution and incidents of marriage. But state legislative power over marriages is not omnipotent. State power over marriages, like "Legislative control of municipalities," must of necessity lie "within the scope of relevant limitations imposed by the United States Constitution." Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339, 344-345. The right to marry is a protected liberty under the Fourteenth Amendment, and is one of the "basic civil rights of man." *Skinner* v. *Oklahoma,* 316 U.S. 535, 541. In *Meyer* v. *Nebraska,* 262 U.S. 390, 399, this Court declared:

> While this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individuals to . . . marry, establish a home and bring up children. . . .

The several majority opinions in *Griswold* v. *Connecticut,* 381 U.S. 479, demonstrate that a variety of constitutional doctrines have been thought to limit the power of the states over the marriage relationship.

Virginia's principal apparent claimed justification for the law against interracial marriage is that stated in *Naim* v. *Naim,* 197 Va. 80, 87 S.E.2d 749, 756, the purpose to "preserve the racial integrity of its citizens," and prevent what it calls "a mongrel breed of citizens". The state's justification thus turns on the amalgam of superstition, mythology, ignorance and pseudo-scientific nonsense sum-

moned up to support the theories of white supermacy and racial "purity." [5]

Clearly, this basis for anti-marriage laws rests on theories long deemed nonsensical throughout the world's community of natural scientists. The distinguished American geneticist Theodosius Dobzhansky has said:

> The idea of a pure race is not even a legitimate abstraction; it is a subterfuge used to cloak one's ignorance of the phenomenon of racial variation. (Dobzhansky, "The Race Concept in Biology," *The Scientific Monthly,* LII (Feb. 1941), pp. 161-165.)

And see the many scientific authorities rejecting the "pure race" idea collected in Weinberger, *"A Reappraisal of the*

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[5] Such nonsensical material pervades the legal opinions upholding laws against intermarriage. See, for example, *State* v. *Jackson,* 80 Mo. 175, 179 (1883):

> "It is stated as a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites. . . ."

See also, *Scott* v. *Georgia,* 39 Ga. 321, 323 (1869):

> "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observations show us, that the offspring of these unnatural connections are generally sick and effeminate, and that they are inferior in physical developments and strength to the full-blood of either race. . . . Such connections never elevate the *inferior* race to the position of *superior,* but they bring down the *superior* to that of the *inferior.* They are productive of evil, and evil only, without any corresponding good." (Emphasis added.)

It is notable that even the word "miscegenation," now widely used in legal literature to refer to intermarriage, was reportedly invented as a hoax in an 1864 political pamphlet connected with a presidential campaign. See discussion in Montague, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE, 400 (4th ed. 1964).

Constitutionality of Miscegenation Statutes," 42 CORNELL L. Q. 208, 217, n. 68.[6]

The 1952 *UNESCO Statement On The Nature of Race,*[7] prepared by distinguished natural scientists from around the world, concludes:

> There is no evidence for the existence of so-called "pure" races. Skeletal remains provide the basis of our limited knowledge about earlier races. In regard to race mixture, the evidence points to the fact that human hybridization has been going on for an indefinite but considerable time. Indeed, one of the processes of race formation and race extinction or absorption is by means of hybridization between races. As there is no reliable evidence that disadvantageous effects are produced thereby, no biological justification exists for prohibiting intermarriage between persons of different races.

Similarly, other pseudoscientific props for racism, including the notions of biological disadvantages of race mixture, and the assumption that cultural levels depend on racial factors, are completely undermined by modern scientific knowledge.[8] For example, the 1952 UNESCO Statement, *supra,* concludes by saying:

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[6] See also Note, 58 YALE L. J. 472 (1949).

[7] The full title is: "Statement on the Nature of Race and Race Differences—by Physical Anthropologists and Geneticists, September 1952," published by UNESCO. The statement, published in numerous publications by UNESCO is conveniently available in Appendix A of Montague, *op. cit.,* 361 et seq.

[8] The importance of environmental factors in determining cultural levels was noted by the court in *Perez* v. *Lippold,* 32 Cal. 2d 711, 198 P.2d 17, 24-25 (1948). Major contemporary research demonstrating the absence of any relation between race and cultural achievement is found in Beals and Hoijer, AN INTRODUCTION TO ANTHROPOLOGY, 195-198 (1953); Hankins, THE RACIAL BASIS OF CIVILIZATION 367-371 (1926); Kroeber,

9. We have thought it worth while to set out in a formal manner what is at present scientifically established concerning individual and group differences.

(1) In matters of race, the only characteristics which anthropologists have so far been able to use effectively as a basis for classification are physical (anatomical and physiological).

(2) Available scientific knowledge provides no basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development.

(3) Some biological differences between human beings within a single race may be as great or greater than the same biological differences between races.

(4) Vast social changes have occurred that have not been connected in any way with changes in racial type. Historical and sociological studies thus support the view that genetic differences are of little significance in determining the social and cultural differences between different groups of men.

(5) There is no evidence that race mixture produces disadvantageous results from a biological point of view. The social results of race mixture whether for good or ill, can generally be traced to social factors.

And see, generally, Montague, *Man's Most Dangerous Myth: The Fallacy of Race* (4th ed. 1964), for a noted anthropologist's full discussion of the most recent scientific evidence and research on race.

ANTHROPOLOGY 190-192 (1958); Ashley Montague, AN INTRODUCTION TO PHYSICAL ANTHROPOLOGY 352-381 (1951); Yerkes, "Psychological Examining in the U. S. Army," 15 MEM. NAT. ACAD. SCI. 705-742 (1921).

Actually, the laws against interracial marriage grew out of the system of slavery and were based on race prejudices and notions of Negro inferiority used to justify slavery, and later segregation. Chief Justice Taney said in *Scott* v. *Sandford*, 19 How. (60 U.S.) 393, 409 that laws against intermarriage:

> . . . show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the persons who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

The court below disparaged the scientific texts cited to it by appellants as an invitation to "judicial legislation" (R. 25). But it is the state which must justify its racial classification. And the state can no more justify its racial classification here by reference to a nonsensical theory of pure races and racial superiority than it could impose some special disability on some citizens on a theory of witchcraft, or restrict their liberty of movement on a claim that the earth is flat.

The sum of the other justifications for the laws against interracial marriage amount to little more than a claim that they promote segregation. They are exemplified by the opinion of the trial judge in appellants' case who declared:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate con-

> tinents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix (R. 16).

Such a theory could, of course, support any kind of discriminatory practice which the States have ever devised; and, indeed, it seems to suggest discriminations never yet attempted in this country. As an individual the Judge is entitled to entertain his private theology. But the Fourteenth Amendment places it entirely beyond the power of the state courts to implement racial discrimination, whatever the rationale.

The court below thought it important to mention its statement in *Naim* v. *Naim*, 197 Va. 80, 87 S.E.2d 749, 753, that "more than one-half of the states then [1955] had miscegenation statutes" (R. 21). That statement is, of course, no longer true. Thirteen states have repealed their anti-marriage laws since 1951 (see Appendix I, *infra*). Laws prohibiting interracial marriages continue in the statute books of only 17 of the 50 states (see Appendix II, *infra*), and it is notable that all of these are southern and border states which had extensive segregation codes[9] prior to *Brown* v. *Board of Education*, 347 U.S. 483.

These laws, having only a racial character and purpose, are relics of the system of human slavery. They should be struck down for the same reasons this Court has invalidated all other segregation laws. As a result of these many decisions, laws against interracial marriage are among the last of such racial laws with any sort of claim to viability. But they are the weakest, not the strongest, of the segregation laws. They intrude a racist dogma into

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[9] The segregation codes of the pre-Brown era are collected in Murray, STATES' LAWS ON RACE AND COLOR (1951).

the private and personal relationship of marriage. The state has no semblance of a rational claim of interest in such an intrusion. Virginia's laws punishing interracial marriage violate the Due Process and Equal Protection Clauses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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